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Guy M. Hicks
General Counsel

T.R.A. DOCKET ROOM

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September 5, 2003

VIA HAND DELIVERY

Hon. Deborah Taylor Tate, Chairman
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37238

Hon. Ron Jones, Director
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37238

Hon. Sara Kyle, Director
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37238

Hon. Pat Miller, Director
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37238

Re: *Implementation of the Federal Communications Commission's Triennial
Review Order (Ninety Day Proceeding)*
Docket No. 03-00490

Dear Chairman Tate and Directors:

This is to request that an additional item be added to the procedural schedule proposed by the Hearing Officer for any 90-day proceeding found to be necessary in the referenced docket. In order to avoid surprise and promote efficiency, we propose that on or before September 24, 2003, any party wishing to put on an affirmative case to request that the TRA seek a waiver from the FCC of its finding of no impairment for access to unbundled local switching for DS1 loops should be required to file a notice with the Authority and serve all entities that have intervened or filed notices in lieu of intervention. The Notice would simply state that the party intends to put on an affirmative case at the TRA in the 90-day proceeding. As indicated at the August 28, 2003 Prehearing Conference in this matter, BellSouth represents that it does not intend to affirmatively ask for such a proceeding.

As explained below, the Notice would allow for a more efficient proceeding and would close a potential procedural "loophole" in the schedule that could be used to the detriment of other parties. Day 1 of the proposed schedule, when discovery requests are due under the proposed procedural schedule, will be October 2, 2003.¹ A

¹ The FCC's rules under the *Triennial Review Order* were published in the Federal Register on September 2, 2003. This means that the rules will not become effective prior to October 2, 2003.

Hon. Deborah Taylor Tate, Chairman
Hon. Sara Kyle, Director
Hon. Ron Jones, Director
Hon. Pat Miller, Director
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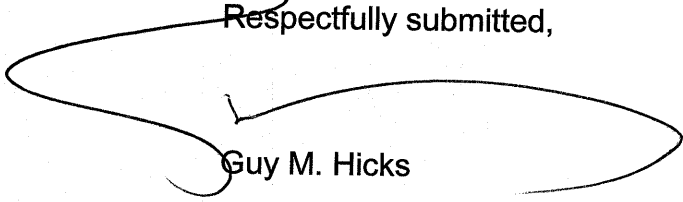
September 24, 2003 Notice date will give any party almost three weeks from now to file the Notice. If no party provides notice of intent to put on a 90-day case, the proposed procedural schedule will not be necessary.²

If any party does seek to put on an affirmative case in the 90-day proceeding, the September 24th Notice would give both the Authority and the other carriers the opportunity to conduct discovery and additional time to prepare a rebuttal case. Otherwise, under the proposed schedule, a party seeking to rebut the presumption could waive discovery, file its entire case on Day 35, and leave parties only 10 days to develop their case in response. In that scenario, the responding parties' deadline to take discovery will have already passed by the time the responding party receives the rebutting party's direct testimony. The September 24th Notice would prevent this scenario and this potential loophole in the procedural schedule.

As information, the Florida Public Service commission issued an *Order* on September 3, 2003 approving its Staff's recommendation that the Commission take no action to rebut the FCC's presumption of no impairment and to close the 90-day docket. A September 24, 2003 deadline was set for any challenges to the *Order*. A copy of the Commission *Notice of Proposed Agency Action Order Finding That No Further Actions Are Necessary To Challenge The FCC's Presumption Of No Impairment and Staff Recommendation of August 25, 2003* in Docket No. 030850-TP are attached for your convenience.

A copy of this letter is being provided to counsel of record for all parties that filed petitions to intervene or notices in lieu of interventions.

Respectfully submitted,



Guy M. Hicks

GMH:ch

² During the procedural meeting held by the Hearing Officer last Thursday in Docket No. 03-00490, none of the lawyers filing interventions and participating in that meeting stated that their clients intended to put on an affirmative case in opposition to the FCC's presumption.

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Implementation of
requirements arising from
Federal Communications
Commission triennial UNE review:
Local Circuit Switching for DS1
Enterprise Customers.

DOCKET NO. 030850-TP
ORDER NO. PSC-03-0988-PAA-TP
ISSUED: September 3, 2003

The following Commissioners participated in the disposition of
this matter:

LILA A. JABER, Chairman
J. TERRY DEASON
BRAULIO L. BAEZ
RUDOLPH "RUDY" BRADLEY
CHARLES M. DAVIDSON

NOTICE OF PROPOSED AGENCY ACTION ORDER FINDING THAT NO FURTHER
ACTIONS ARE NECESSARY TO CHALLENGE THE FCC'S
PRESUMPTION OF NO IMPAIRMENT

BY THE COMMISSION:

NOTICE is hereby given by the Florida Public Service
Commission that the action discussed herein is preliminary in
nature and will become final unless a person whose interests are
substantially affected files a petition for a formal proceeding,
pursuant to Rule 25-22.029, Florida Administrative Code.

BACKGROUND

On February 20, 2003, the Federal Communications Commission
(FCC) adopted new rules pertaining to incumbent local exchange
companies' (ILECs) obligations to unbundle certain elements of
their networks and make these unbundled elements available to
competitive local exchange telecommunications companies (CLECs) at
prices based on the ILEC's Total Element Long-Run Incremental Cost
(TELRIC). Although the FCC's order memorializing its decisions
(FCC 03-36) was not released until August 21, 2003, key findings

DOCUMENT NUMBER DATE

08179 SEP-38

FPSC-COMMISSION CLERK

were made known in a press release on the day of the FCC's vote. Among other matters, the FCC found that "... switching - a key UNE-P element - for business customers served by high-capacity loops such as DS-1 will no longer be unbundled based on a presumptive finding of no impairment. Under this framework, states will have 90 days to rebut the national finding." The treatment of such enterprise customers is detailed at ¶¶451 through 458 of the FCC's Order. We note that the 90 days referred to above is from the effective date of the FCC's order, not the order's release date.

This Order addresses the FCC's presumption of no impairment absent access to unbundled local switching for business customers who obtain access via high-capacity loops.

DECISION:

In order to determine whether or not the FCC's no impairment presumption regarding access to unbundled local switching (ULS) to business customers with high-capacity loops (also referred to as enterprise customers) was reasonable, our staff made inquiries of Florida's largest ILECs. Specifically, they asked them how many UNE combinations consisting of a DS1 loop with unbundled local switching they are currently providing to CLECs in Florida. Our assumption was that if relatively few of this type of UNE combination were being ordered, it was highly unlikely that a showing of impairment could be sustained.

As suspected, very few DS1 loop with ULS combinations are being provided in Florida. Verizon and Sprint indicated that they have provisioned no such UNE combinations in their service territories. BellSouth has informed us that they are providing around 70 combinations of high-capacity loops with unbundled local switching to 6 CLECs in Florida. To put the BellSouth data in perspective, BellSouth provides over 7,000 DS1 unbundled loops in Florida to 27 CLECs. Based on the very limited demand that exists for the combination of DS1 loops with unbundled local switching, we believe that CLECs are not impaired absent access to unbundled local switching for business customers served via high-capacity loops, as presumed by the FCC. Accordingly, we shall not initiate a proceeding to investigate whether to challenge the FCC's

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presumption. Thus, no further actions on this matter are necessary.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that this Commission will not initiate a proceeding to investigate whether to challenge the FCC's presumption of no impairment, and that no further actions on this matter are necessary. It is further

ORDERED that the provisions of this Order, issued as proposed agency action, shall become final and effective upon the issuance of a Consummating Order unless an appropriate petition, in the form provided by Rule 28-106.201, Florida Administrative Code, is received by the Director, Division of the Commission Clerk and Administrative Services, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, by the close of business on the date set forth in the "Notice of Further Proceedings" attached hereto. It is further

ORDERED that in the event this Order becomes final, this Docket shall be closed.

By ORDER of the Florida Public Service Commission this 3rd Day of September, 2003.

BLANCA S. BAYÓ, Director
Division of the Commission Clerk
and Administrative Services

By: Kay Flynn
Kay Flynn, Chief
Bureau of Records and Hearing
Services

(S E A L)

LF

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NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing that is available under Section 120.57, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing will be granted or result in the relief sought.

Mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing.

The action proposed herein is preliminary in nature. Any person whose substantial interests are affected by the action proposed by this order may file a petition for a formal proceeding, in the form provided by Rule 28-106.201, Florida Administrative Code. This petition must be received by the Director, Division of the Commission Clerk and Administrative Services, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, by the close of business on September 24, 2003.

In the absence of such a petition, this order shall become final and effective upon the issuance of a Consummating Order.

Any objection or protest filed in this/these docket(s) before the issuance date of this order is considered abandoned unless it satisfies the foregoing conditions and is renewed within the specified protest period.

State of Florida



Public Service Commission
CAPITAL CIRCLE OFFICE CENTER • 2540 SHUMARD OAK BOULEVARD
TALLAHASSEE, FLORIDA 32399-0850

-M-E-M-O-R-A-N-D-U-M-

DATE: AUGUST 25, 2003

TO: DIRECTOR, DIVISION OF THE COMMISSION
ADMINISTRATIVE SERVICES (BAYO)

FROM: DIVISION OF COMPETITIVE MARKETS & ENFORCEMENT (DOWDS)
OFFICE OF THE GENERAL COUNSEL (FORDHAM) *JK*

RE: DOCKET NO. 030850-TP - IMPLEMENTATION OF REQUIREMENTS
ARISING FROM THE FEDERAL COMMUNICATIONS COMMISSION'S
TRIENNIAL UNE REVIEW: LOCAL CIRCUIT SWITCHING FOR DS1
ENTERPRISE CUSTOMERS

AGENDA: 09/02/2003 - REGULAR AGENDA - PROPOSED AGENCY ACTION -
INTERESTED PERSONS MAY PARTICIPATE

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: NONE

FILE NAME AND LOCATION: S:\PSC\CMP\WP\030850.RCM

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COMMISSION
CLERK
[Signature]

CASE BACKGROUND

On February 20, 2003, the Federal Communications Commission (FCC) adopted new rules pertaining to incumbent local exchange companies' (ILECs) obligations to unbundle certain elements of their networks and make these unbundled elements available to competitive local exchange telecommunications companies (CLECs) at prices based on the ILEC's Total Element Long-Run Incremental Cost (TELRIC). Although the FCC's order memorializing its decisions (FCC 03-36) was not released until August 21, 2003, key findings were made known in a press release on the day of the FCC's vote. Among other matters, the FCC found that "... switching - a key UNE-P element - for business customers served by high-capacity loops such as DS-1 will no longer be unbundled based on a presumptive finding of no impairment. Under this framework, states will have 90 days to rebut the national finding." (Attachment to Triennial Review Press Release, page 1) The treatment of such

DOCUMENT NUMBER-DATE

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FPSC-COMMISSION CLERK

DOCKET NO. 030850-TP
DATE: AUGUST 25, 2003

enterprise customers is detailed at ¶¶451 through 458 of the FCC's Order. Staff would note that the 90 days referred to above is from the effective date of the FCC's order, not the order's release date. At this time, the effective date is not known; it will be 30 days after publication in the Federal Register, which event has not yet occurred.

This is staff's recommendation on what actions the Commission should take with respect to the FCC's presumption of no impairment absent access to unbundled local switching for business customers who obtain access via high-capacity loops.

DISCUSSION OF ISSUES

ISSUE 1: What actions should the Commission take regarding the FCC's presumption of no impairment absent access to unbundled local switching for business customers who obtain network access via high-capacity loops?

RECOMMENDATION: Staff recommends that the Commission take no actions to rebut the FCC's presumption of no impairment absent access to unbundled local switching for business customers who obtain network access via high-capacity loops. (DOWDS)

STAFF ANALYSIS: In order to determine whether or not the FCC's no impairment presumption regarding access to unbundled local switching (ULS) to business customers with high-capacity loops (also referred to as enterprise customers) was reasonable, staff made inquiries of Florida's largest ILECs. Specifically, we asked them how many UNE combinations consisting of a DS1 loop with unbundled local switching they are currently providing to CLECs in Florida. Staff's assumption was that if relatively few of this type of UNE combination were being ordered, it was highly unlikely that a showing of impairment could be sustained.

As suspected, very few DS1 loop with ULS combinations are being provided in Florida. Verizon and Sprint indicated that they have provisioned no such UNE combinations in their service territories. BellSouth has informed staff that they are providing around 70 combinations of high-capacity loops with unbundled local switching to 6 CLECs in Florida. To put the BellSouth data in perspective, BellSouth provides over 7,000 DS1 unbundled loops in Florida to 27 CLECs. Based on the very limited demand that exists for the combination of DS1 loops with unbundled local switching, staff believes that CLECs are not impaired absent access to unbundled local switching for business customers served via high-capacity loops, as presumed by the FCC. Accordingly, we recommend that the Commission should not initiate a proceeding to investigate whether to challenge the FCC's presumption, and that no further actions on this matter are necessary.

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DATE: AUGUST 25, 2003

ISSUE 2: Should this docket be closed?

RECOMMENDATION: Yes. If no person whose substantial interests are affected files a protest within 21 days of the issuance date of the Order, the Order should become final upon the issuance of a Consummating Order. If the Order is protested, the procedures enumerated in the Staff Analysis should govern subsequent actions in this docket. (FORDHAM, DOWDS)

STAFF ANALYSIS: If no person whose substantial interests are affected files a protest within 21 days of the issuance date of the Order, the Order should become final upon the issuance of a Consummating Order. However, if a party protests the PAA order, such protest triggers commencement of the 90-day proceeding to attempt to rebut the FCC's presumption of no impairment. In order for the Commission to render a decision within the FCC-mandated period, an expedited schedule will be required. Accordingly, the following schedule should control the 90-day proceeding: (1) an order establishing procedure containing firm dates should be issued as soon after the protest as is feasible; (2) the party protesting the Commission's PAA order should be required to prefile its testimony and exhibits, including all data on which it bases its claim of impairment, within seven days after the FCC's Triennial Review Order (TRO) becomes effective; (3) any intervenor testimony and exhibits should be due 21 days after the effective date of the TRO; (4) the hearing in this matter should be scheduled for approximately 28 days after the TRO is effective; (5) briefs and a staff recommendation should be due 35 and 60 days, respectively, after the TRO's effective date; and (6) a Commission vote should occur about 70 days after the TRO effective date, with a final order to be issued by day 90. All filings in this proceeding are to be made in hard copy and electronically, and all filings should be simultaneously served on Commission staff.

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DATE: AUGUST 25, 2003

SCHEDULE

	TRO EFFECTIVE DATE
Protester's Filing	+ 7 days
Intervenor Testimony	+ 21 days
Hearing	+ 28 days
Briefs	+ 35 days
Staff Recommendation	+ 60 days
Commission vote	+ 70 days
Final Order	+ 90 days

To accommodate this expedited proceeding, all discovery requests should be served via hand-delivery, electronic mail, facsimile, or overnight courier. Further, within 10 days of service of a discovery request, the respondent should serve its responses to the requesting party via hand-delivery, electronic mail, facsimile, or overnight courier. When discovery requests are served and the respondent intends to object to or ask for clarification of the discovery request, the objection or request for clarification should be made within five days of service of the discovery request. This procedure is intended to reduce delay in resolving discovery disputes. All discovery should be completed five days prior to the hearing.

CERTIFICATE OF SERVICE

I hereby certify that on September 5, 2003, a copy of the foregoing document was served on the parties of record, via the method indicated:

☐ Hand
☐ Mail
☐ Facsimile
☐ Overnight
☒ Electronic

Henry Walker, Esquire
Boult, Cummings, et al.
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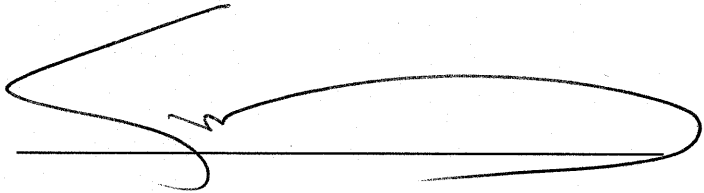
Ms. Carol Kuhnow
Qwest Communications, Inc.
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Dale Grimes, Esquire
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A handwritten signature in black ink, appearing to read "Dale Grimes", written over a horizontal line.